Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-117 OF 1992
HARUN HASHIM, EDGAR JOSEPH JR SCJJ AND LIM BENG CHOON J
3 JANUARY 1994

Banking *— Banking regulations — Acquisition of interest in shares of financial institution — Plaintiffs agreed to purchase shares of company which owned shares in financial institution — Whether approval from minister required — Whether agreement void and unenforceable if written permission not obtained — Whether agreement could be saved — Banking and Financial Institutions Act 1989 ss 45, 48 & 125 — Companies Act 1965 s 6A — Contracts Act s 24*

Statutory Interpretation *— Construction of statutes — Intention of statute — Banking and Financial Institutions Act 1989 — Whether contract made in contravention of s 45 void and unenforceable — Whether s 125 showed an intention that contract should be enforceable unless otherwise provided*

The first respondent, on behalf of a consortium of lenders which it managed, agreed to sell and the appellant agreed to buy shares in Kesang Corp Bhd ('Kesang') at a price of RM2.70 per share amounting to RM21.06m ('the agreement'). At that time, the shares were registered in the name of the second respondent. Part of the shares were delivered and payment was made by cheque to the first respondent. The first respondent however, never presented the cheques for payment because it considered that prior consent of the Minister of Finance had to be obtained under s 45(1) of the Banking and Financial Institutions Act 1989 ('the Act'). At all material times, the shares constituted 32.98% of the issued share capital of Kesang, which in turn held 17.5% of the shares of KCB Finance Bhd, a licensed local financial institution. By virtue of s 6A of the Companies Act 1965, the first respondent was deemed to have an interest in the shares of KCB Finance Bhd by reason of the fact that Kesang had a direct 17.5% interest in the shares of KCB Finance Bhd and so the first respondent would be entitled to exercise 32.98% (or not less than 15%) of the votes attached to the voting shares of Kesang. Both the appellant and the first respondent applied to Bank Negara for written approval, but both applications were rejected. The first respondent then repudiated the agreement and the appellant in turn issued a writ for damages against the respondents, alleging that the written consent of the Minister of Finance was not required for the agreement.

At the trial, the following preliminary points of law were argued: (i) whether the agreement was subject to both the appellant and the respondents successfully obtaining the prior written approval of Bank Negara and the Minister of Finance pursuant to s 45 of the Act; (ii) whether the appellant's failure to obtain the prior written approval

of Bank Negara and/or the Minister of Finance rendered the agreement void or unenforceable; and (iii) whether the agreement was, in any event, rendered void and unenforceable by Bank Negara's refusal to grant its approval.

The trial judge answered all three questions in the affirmative, ie in favour of the respondents, though she did not dismiss the suit. [See [1992] 2 MLJ 603.] From that decision, the appellant appealed to the Supreme Court. The appellant relied on s 125 of the Act which states that except as otherwise provided in the Act, no agreement in contravention of any provision of the Act shall be void, and argued that s 125 saved the agreement from being void notwithstanding a breach of s 45(1).

Held, dismissing the appeal and the suit:

(1) The general principle that a contract, the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself, had no application to the present case where the Act provides to the opposite effect, namely, that while it prohibits and penalizes certain agreements or arrangements, it nevertheless reveals an intention that generally a contract shall be valid and enforceable; the exception being where it is otherwise provided in the statute or in pursuance of any provision therein.

(2) Section 125 of the Act is a saving provision which says that except as otherwise provided in the Act, no contract or agreement or arrangement, in contravention of any provision of the Act, shall be void solely by reason of such contravention. Therefore, the mere fact that an agreement or arrangement is in contravention of s 45(1) of the Act is not by itself alone enough to render the same void; to be so, there must be some other provision in the Act which has that effect. A consideration of ss 48, 54(1) and (7) showed that they are invalidating provisions which can be fairly considered as falling within the meaning and ambit of the exception in s 125, so as to render the agreement void.

(3) Furthermore, as the alleged sale and purchase agreement had contravened the provisions of s 45(1) of the Act and, being an act or undertaking which was forbidden by law in that it violated a prohibitory enactment by the legislature, it was void by reason of s 24 of the Contracts Act 1950. The trial judge was therefore right in answering the preliminary questions of law in the affirmative.

[Bahasa Malaysia summary

Responden pertama, bagi pihak sekumpulan peminjam yang diurus olehnya, bersetuju menjual dan perayu bersetuju membeli saham dalam Kesang Corp Bhd ('Kesang') pada harga RM2.70 sesaham berjumlah RM21.06 juta ('perjanjian itu'). Pada masa itu, saham

tersebut didaftar dalam nama responden kedua. Sebahagian daripada saham itu telah dihantarkan dan bayaran telah dibuat melalui cek kepada responden pertama. Responden pertama bagaimanapun tidak mengemukakan cek itu untuk bayaran kerana ia berpendapat bahawa keizinan terdahulu Menteri Kewangan diperlukan di bawah s 45(1) Akta Bank dan Institusi Kewangan 1989 ('Akta itu'). Pada setiap masa material, saham itu membentuk 32.98% daripada modal saham keluaran Kesang, yang memegang 17.5% daripada saham KCB Finance Bhd, sebuah institusi kewangan tempatan yang berlesen. Mengikut s 6A Akta Syarikat 1965, responden pertama dianggap sebagai mempunyai suatu kepentingan di dalam saham KCB Finance Bhd oleh kerana Kesang mempunyai suatu kepentingan langsung sebanyak 17.5% dalam saham KCB Finance Bhd dan oleh itu responden pertama berhak menggunakan 32.98% (atau tidak kurang daripada 15%) daripada undi yang terikat kepada saham Kesang yang membawa hak mengundi. Kedua-dua perayu dan responden pertama telah memohon kepada Bank Negara untuk mendapat keizinan bertulis, tetapi kedua-dua permohonan itu telah ditolak. Responden pertama kemudiannya telah menolak perjanjian itu dan perayu telah mengeluarkan writ untuk menuntut ganti rugi terhadap responden, dengan mengatakan bahawa keizinan bertulis Menteri Kewangan tidak diperlukan bagi perjanjian itu.

Pada perbicaraan, perkara permulaan mengenai undang-undang yang berikut telah dihujahkan: (i) sama ada perjanjian itu tertakluk kepada kejayaan kedua-dua perayu dan responden untuk mendapat keizinan bertulis terlebih dahulu daripada Bank Negara dan Menteri Kewangan mengikut s 45 Akta itu; (ii) sama ada kegagalan plaintif mendapat keizinan bertulis Bank Negara dan/atau Menteri Kewangan itu menjadikan perjanjian itu tidak sah dan tidak boleh dikuatkuasakan; dan (iii) sama ada perjanjian itu, walau bagaimanapun, telah dijadikan tidak sah dan tidak boleh dikuatkuasakan disebabkan keengganan Bank Negara untuk memberi keizinannya.

Hakim perbicaraan telah menjawab ketiga-tiga soalan itu secara mengiakan, iaitu memihak kepada pihak responden, sungguhpun beliau tidak membuang tindakan itu. [Lihat [1992] 2 MLJ 603.] Daripada keputusan itu, perayu membuat rayuan kepada Mahkamah Agung. Perayu bergantung kepada s 125 Akta itu yang menyatakan bahawa kecuali sebagaimana yang diperuntukkan selainnya dalam Akta itu, tiada perjanjian yang dibuat berlanggaran dengan mana-mana peruntukan Akta itu boleh menjadi tidak sah, dan berhujah bahawa s 125 telah menyelamatkan perjanjian itu daripada menjadi tidak sah meskipun terdapat suatu perlanggaran s 45(1).

Diputuskan, menolak rayuan dan membuang tindakan itu:

(1) Prinsip am bahawa sesuatu kontrak, yang pembuatannya dilarang oleh statut secara nyata atau tersirat, akan menjadi tidak sah dan tidak boleh dikuatkuasakan kecuali statut itu sendiri menyelamatkan kontrak itu atau terdapat tujuan sebalik yang semunasabahnya boleh dibaca daripada bahasa statut itu sendiri,

tidak terpakai dalam kes ini di mana Akta itu memperuntukkan kesan sebaliknya, iaitu walaupun ia melarang dan menghukum perjanjian atau urusan tertentu, ia walau bagaimanapun mendedahkan suatu tujuan bahawa secara amnya, sesuatu kontrak itu adalah sah dan boleh dikuatkuasakan; kekecualiannya adalah di mana diperuntukkan sebaliknya di dalam statut itu atau mengikut mana-mana peruntukan di dalamnya.

(2) Seksyen 125 Akta itu merupakan suatu peruntukan penyelamat yang menyatakan bahawa kecuali diperuntukkan sebaliknya di dalam Akta itu, sesuatu kontrak atau perjanjian atau urusan, yang melanggar sebarang peruntukan Akta itu, tidak akan menjadi tidak sah hanya kerana pelanggaran itu. Oleh itu, hakikat bahawa sesuatu perjanjian atau urusan melanggar s 45(1) Akta itu dengan sendirinya tidak mencukupi untuk menjadikan perjanjian itu tidak sah; untuk dijadikan demikian, mesti terdapat peruntukan lain di dalam Akta itu yang mempunyai kesan seperti itu. Suatu pertimbangan ss 48(1), 54(1) dan (7) Akta itu menunjukkan bahawa seksyen itu merupakan peruntukan mentaksahkan dan boleh dengan wajarnya dianggap sebagai termasuk dalam maksud dan lingkungan kekecualian di dalam s 125, untuk menjadikan perjanjian itu tidak sah.

(3) Lebih-lebih lagi, oleh kerana perjanjian jualbeli yang dikatakan itu telah melanggar peruntukan s 45(1) Akta itu dan merupakan suatu perbuatan atau akujanji yang dilarang oleh undang-undang kerana melanggar suatu enakmen larangan yang dibuat oleh badan perundangan, ia tidak sah di bawah s 24 Akta Kontrak 1950. Oleh itu, hakim perbicaraan adalah betul apabila menjawab soalan permulaan mengenai undang-undang secara mengiakan.]

Cases referred to

1 *RV & Co v Hindu Religious Endowment Board* AIR 1940 Mad 10 (refd)
2 *Madho Singh v James Skinner* AIR 1942 Lah 243 (refd)
3 *Gaya Prasad v Kalapnath* AIR 1929 Oudh 389 (refd)
4 *EIR v Jotrram Chandrabhan* AIR 1928 Lah 162 (refd)
5 *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (distd)
6 *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 (refd)
7 *Babiah v Mohammed Abdus Subhan* [1954] A Hyd 156 (FB) (refd)
8 *Fakirchand v Bensilal* [1955] A Hyd 28 (FB) (refd))
9 *Bhashayya v Chinnapareddi* [1960] AAP 39 (refd)
10 *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91 (refd)
11 *Melliss & Anor v The Shirley & Freemantle Local Board of Health* (1885) 16 QBD 451 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 1, 2, 45, 48, 54, 125, Third and Fourth Schedules
Companies Act 1965 s 6A
Contracts Act 1950 s 24

Appeal from: Civil Suit No D4–22–622 of 1990 (High Court, Kuala Lumpur)

KS Narayanan (*KS Narayanan & Associates*) for the appellant.
Porres Royan (*Karen Kaur* with him) (*Shook Lin & Bok*) for the respondents.

Edgar Joseph Jr SCJ (delivering the grounds of judgment of the court): The facts which gave rise to the dispute which resulted in the litigation in the High Court (Commercial Division), Kuala Lumpur, and which in turn led to this appeal are simple and may be stated shortly. But, before we proceed to do so, we wish to say at the outset, that in this judgment, unless the context otherwise requires, it would be more convenient to refer to the appellant, Coramas Sdn Bhd, the first respondent, Rakyat First Merchant Bankers Bhd, and the second respondent, Rakyat First Nominees Sdn Bhd, as the plaintiff, the first defendant and the second defendant, respectively.

By an alleged oral agreement confirmed by a letter dated 14 December 1989 signed by the managing director of the plaintiff, Mr Patrick Lim Hong Koon, addressed to the first defendant, the latter had agreed to sell and the plaintiff had agreed to purchase 7.8m shares ('the shares') in Kesang Corp Bhd ('Kesang') at a price of RM2.70 per share amounting to RM21.06m. The terms of that letter were as follows:

> 14 December 1989
>
> Rakyat First Merchant Bankers Bhd
> 9th Floor, Bangunan Angkasa Raya
> Jalan Ampang
> 50450 Kuala Lumpur.
>
> Attention: Ms Yong Siew Kat
>
> Dear Ms
>
> Re: 7.8m shares in Kesang Corp Bhd
>
> I refer to the telephone conversation with your Ms Yong Siew Kat this morning.
>
> This is to confirm that we have agreed to purchase from you 7.8m shares in the above company at the price of RM2.70 per share totalling RM21.06m.
>
> As agreed we shall jointly appoint a firm of solicitors to take delivery of the shares from you and to arrange for payment by them to you thereafter.
>
> Thank you.
>
> Yours faithfully
> Coramas Sdn Bhd
> —Sgd—
> Patrick Lim Hong Koon
> Managing Director

A consortium of lenders managed by the first defendant had then extended a term loan/stand-by credit of RM36m to an incorporated company known as Safuan Holdings Sdn Bhd ('Safuan') upon the security, inter alia, of a pledge of 7.8m shares in a publicly listed company, Kesang, registered in the name of the second defendant. Safuan having made default in the repayment of the loan, the consortium of lenders had decided to enforce the security by sale of the shares.

Accordingly, by an alleged oral agreement confirmed by a letter dated 14 December 1989, signed by the managing director of the plaintiff, Mr Patrick Lim Hong Koon, addressed to the first defendant, the first defendant, on behalf of the lenders, had agreed to sell to the plaintiff and the plaintiff had agreed to purchase the shares at a price of RM2.70 per share amounting to RM21.06m. For brevity and convenience, we shall refer to this transaction as 'the proposed sale and purchase transaction'.

At first, payment of the purchase price was to have been effected in full by a single payment but later this term of the alleged agreement was varied by mutual consent, the effect of which was that the legal firm of Mah Kok & Din were to act as stakeholder, that the plaintiff would take delivery of the shares from the shareholder in two tranches of 5m and 2.3m respectively, upon payment by way of cashier's orders of the sums of RM13.5m and RM7.56m, in respect of each tranche.

It was common ground that the plaintiff's intention in embarking upon this proposed transaction was to resell the shares to a third party, namely, Aeroway Sdn Bhd ('Aeroway'), at a profit, that is to say, at a price of RM3.10 per share and it was from the expected proceeds of this resale that the plaintiff had expected to settle the amount payable under its alleged agreement with the first defendant.

Be that as it may, pursuant to the proposed sale and purchase transaction, the second defendant delivered the first tranche of 5m shares to the stakeholder within the stipulated time, who, in turn, made payment in respect thereof by two cheques of RM13.5m and RM7.56m, respectively, to the first defendant.

However, the first defendant never presented the two cheques for payment because it was at this juncture that it considered that prior written consent of the Minister of Finance under s 45(1) of the Banking and Financial Institutions Act 1989 ('the Act') had to be, but was not, obtained.

Section 45(1) provides:

> Without prejudice to sections 49 and 50, and subject to section 46, no person shall enter into an agreement or arrangement to acquire or dispose any interest in the shares of a licensed local institution by which, if the agreement or arrangement is carried out, he would —
>
> (a) acquire, together with any interests in the shares of that institution which were then already held by him, or by him and by persons acting in concert with him; or
> (b) dispose, together with the interests in shares previously disposed by him to any single person or any persons acting in concert, to such single person or such persons acting in concert,

an aggregate interest in shares of not less than five per centum of the shares of that institution, without obtaining the prior written approval of the Minister to enter into such agreement or arrangement:

Provided that no such approval shall be granted in respect of any acquisition or disposal which would result in a contravention of section 46.

In consequence, both the plaintiff and the first defendant had applied formally by letters dated 28 December 1989 and 29 December 1989, respectively, to Bank Negara for written consent under s 45(1), but both applications were rejected by separate letters, each dated 28 February 1990.

This led to the first defendant repudiating the alleged agreement which in turn led to the plaintiff issuing a writ for damages both general and liquidated, as well as other reliefs, for breach of contract against both the defendants, it being alleged that the written consent of the Minister of Finance under s 45(1) was not required for the proposed sale and purchase transaction.

At the outset of the hearing before Siti Norma Yaakob J, the following preliminary points of law were argued:

(1) whether the purported contract dated 14 December 1989 between the plaintiff and the defendants for the purchase of the shares in Kesang was subject to both the plaintiff and the defendants successfully obtaining the prior written approval of Bank Negara Malaysia and of the Minister of Finance pursuant to s 45 of the Act;

(2) whether the plaintiff's failure to successfully obtain the prior written approval of Bank Negara and/or the Minister of Finance rendered the said contract to purchase the shares in Kesang in any way void or unenforceable; and

(3) whether the purported contract dated 14 December 1989 was in any event rendered void and unenforceable by reason of the letter dated 28 February 1990 from Bank Negara Malaysia to the defendants informing the defendants that their proposal to sell the shares in Kesang to the plaintiff was not approved.

After hearing full arguments, her Ladyship answered all three questions in the affirmative, that is to say, in favour of the defendants, though she did not dismiss the suit. [See [1992] 2 MLJ 603.] From that decision, the plaintiff had appealed to this court.

At all material times, the issued share capital of Kesang was RM23,649,946 divided into 23,649,946 ordinary shares of RM1 each, the subject matter of the proposed sale and purchase transaction which, of course, meant that the shares constituted 32.98% of the issued share capital of Kesang.

At all material times, the issued share capital of KCB Finance Bhd was RM5.5m divided into 5,500,080 ordinary shares of RM1 each and of these shares, Kesang was the registered shareholder of 962,500 ordinary shares which, of course, meant that Kesang's shareholding in KCB Finance constituted 17.5% of the latter's issued share capital.

Now, by reason of s 45(1) and (2) and s 2(1) of the Act, 'interest in a share' has to be construed having regard to sub-ss (2)–(10) of s 6A of the Companies Act 1965. More particularly, the applicable provision in the

context of the facts of the present appeal is sub-s (4)(c) of s 6A which reads as follows: A

> A person shall be deemed to have an interest in a share where a body corporate has an interest in a share and —
>
> ...
>
> (c) that person, or the associates of that person or that person and his associates are entitled to exercise or control the exercise of not less than fifteen per centum of the votes attached to the voting shares in the body corporate. B

It follows, therefore, that the first defendant is deemed to have an interest in the shares of KCB Finance (a licensed local institution) by reason of the fact that Kesang had a direct 17.5% interest in the shares of KCB Finance Bhd and so the first defendant would be entitled to exercise 32.98% (or in other words, not less than 15%) of the votes attached to the voting shares of Kesang. C

The defendants contended that the effect of s 45(1) is that the prior written approval of the Minister of Finance was required before a person in the position of the plaintiff could enter into such an agreement or arrangement as had been entered into here, and that when, as here, there had been an omission to comply with that essential formality, the plaintiff lacked the capacity to enter into such agreement or arrangement. In the result, the alleged agreement was void and unenforceable — so it was said. D

On the other hand, the argument per contra, advanced by counsel for the plaintiff, was that s 125 of the Act saved the alleged agreement from being void and unenforceable notwithstanding a breach of s 45(1). E

Section 125 provides:

> Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into contravention of any provision of this Act shall be void solely be reason of such contravention: F
>
> Provided that nothing contained in this section shall affect any criminal liability of any person for an offence under this Act in respect of such contravention.

It was argued that neither s 45 nor any other section in the Act declares that an agreement in contravention of s 45(1) is void.

The issue, therefore, appeared to us to be purely and simply one of construction, and in the ultimate resort, must be determined upon the actual words used in ss 45(1) and 125, read not *in vacuo* but as occurring in a single complex statute, in which one part may throw light upon another. G

First of all, there are certain preliminary observations we should like to make regarding s 125. H

According to s 125, no contract, etc, entered into in contravention of any provision of the Act shall be void solely by reason of such contravention. But there is an exception engrafted on this section as is clear from the opening words of the section, namely, 'Except as otherwise provided in this Act or in pursuance of any provision of this Act', when such a contract, etc, would be void by reason of some other provision of the Act. To put it another way, by s 125, a general intention is expressed that no contract, etc, entered into in contravention of the Act shall be void solely by reason of I

such contravention, but it expresses also a particular intention, incompatible with the general intention indicated by the opening words aforesaid, which words are to be regarded as being in the nature of an exception (*RV & Co v Hindu Religious Endowment Board*[1] at p 11). An exception must be construed strictly (*Madho Singh v James Skinner*[2] at p 248) and should not be allowed to affect the general rule. It must be confined within its own limits and strictly to the subject matter embraced within it and it should not be extended by analogy to include cases not reasonably within the purview of the language employed (see *Gaya Prasad v Kalapnath*[3]). Also, exceptions are to be taken most strongly against the party for whose benefit they are introduced (see *EIR v Jotrram Chandrabhan*[4] at p 163). The enumeration of exceptions to a general rule would exclude, by necessary implication, all other exceptions.

However, the wording of the exception occurring in s 125 is merely descriptive and does not say when such contract, agreement or arrangement entered into in contravention of the Act would be void. To answer that question, we have to look for some other provision of the Act which has that effect.

So, what it comes to is this: the Act does not in terms say that an agreement or arrangement in direct contravention of it is to be void. On the contrary, it provides by s 125, a saving provision which says that except as otherwise provided in the Act, no contract or agreement or arrangement, in contravention of any provision of the Act, shall be void solely by reason of such contravention.

With respect, this is a point which the judge in the court below did not appreciate, as is apparent from the following passage in her judgment (at p 18 para 2):

> In this case, neither the plaintiff nor the first defendant had the capacity to enter into the proposed contract as at 14 December 1989 and, without the prior written approval, there is no agreement which can be saved by s 125. My conclusion is borne out by the first four words of that section, 'Except as otherwise provided'. Since the Act has not expressly provided that an agreement entered into before a written Ministerial approval has been obtained can be validated, the contract entered into by the parties to this suit is void and unenforceable.

It might be that what caused the judge to adopt a wrong approach to the question of construction which arose for decision was the general principle referred to by the Supreme Court in the case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*[5] that a contract, the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.

This general principle could have no application to the present case where the statute provides to the opposite effect, namely, that while it prohibits and penalizes certain agreements or arrangements, it nevertheless reveals an intention that generally they shall be valid and enforceable; the exception being where it is otherwise provided in the statute or in pursuance of any provision therein. Provisions of this sort are rare and so we are

reminded of the following passage in the judgment of Gibbs ACJ in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*:[6]

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because *it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable*, and in most cases it is sufficient to say, as has been said in many cases of authority, that the *test* is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is *a question of construction* whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed. (Emphasis added.)

We had also kept in mind the provisions of s 24 of the Contracts Act 1950 (Rev 1974), since the broad question for decision was whether the alleged agreement was unlawful by reason thereof as being an act or undertaking which was forbidden by law in that it violated a prohibitory enactment of the legislature and that it was by reason of that void.

Section 24 of the Contracts Act 1950 provides:

> The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The relevant principles to be distilled from various authorities which afford guidance on the interpretation of s 24 of the Contracts Act 1950 are conveniently collected in *Pollock Principles of Contract* (10th Ed) at p 233, and have been applied in *Babiah v Mohammed Abdus Subhan*;[7] *Fakirchand v Bensilal*[8] and *Bhashayya v Chinnapareddi*.[9] These principles merit reading and are as follows:

> When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the legislature in imposing the conditions was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition were imposed; (but they) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, eg the convenient collection of the revenue.

In our general survey of the authorities under s 24 of the Contracts Act 1950, cited in *Pollock*, we encountered the case of *George v Greater Adelaide*

A *Land Development Co Ltd*,[10] which shows that a statutory prohibition against an agreement need not be express so long as it is implied. In that case, s 23 of the Town Planning and Development Act 1920 (SA) made it unlawful for any person to subdivide any land into allotments or to offer for sale or to sell, etc, any existing allotment except in accordance with the provisions of the statute, and the section imposed a penalty on any person acting in B contravention of that provision. A contract for the sale of certain allotments had been entered into at a time when the provisions of the statute had not been complied with though the contract was expressed to be subject to the provisions of the statute having been complied with. Indeed, subsequent to the contract, the statute was complied with. It was held that although C neither the statute nor the regulations thereunder expressly prohibited selling before issue of a certificate thereunder, the prohibition was implied from the steps to be taken by any person desiring to sell land, and so the contract was illegal and invalid for contravention of the statute and the moneys paid by the purchaser under it recoverable.

We must now embark upon a more detailed consideration of the question D that arises for decision.

Before us, counsel for the defendants had contended that the other provisions of the Act at which we should look to determine whether the contravention of s 45(1) of the Act had resulted in the agreement being void were ss 48(1), 54 and, in particular, sub-s (11) thereof. The question which E arises is whether he is correct in his contention.

In the present case, s 45(1) expressly prohibits any person from entering into any agreement or arrangement to acquire or dispose of any interest in the shares of a licensed institution of the kind defined therein without obtaining the prior written approval of the Minister of Finance. The Act goes on to provide by s 103(1) read with the Fourth Schedule, item 59, that F any person who contravenes the provisions of s 45(1) commits an offence and shall on conviction be liable to imprisonment not exceeding five years or a fine not exceeding RM5m or with both such imprisonment and fine.

The next question is whether the Act does more than impose a penalty or in other words, does non-compliance with its provisions render the G agreement or arrangement void?

In accordance with the judgment of Lord Esher MR in *Melliss v Shirley Local Board*,[11] we have to look at the statute as a whole and consider whether it imposes a penalty merely to deter persons from entering into such a contract, or for the purposes of revenue, or whether it is intended that a contract so entered into shall be valid in law.

H It follows that the mere fact that an agreement or arrangement is in contravention of s 45(1) of the Act is not by itself alone enough to render the same void; to be so, there must be *some other provision in the Act which has that effect.*

So, we asked ourselves whether there were any, and if so, what invalidating I provisions in the Act, which could fairly be considered as falling within the meaning and ambit of the opening words of s 125 — 'Except as otherwise provided in this Act or in pursuance of any provision of this Act ...'.

Our attention was directed by counsel for the defendants to s 48(1) of the Act which provides:

> Subject to subsection (2), nothing contained in sections 45, 46 and 47 shall render invalid any acquisition or disposal of any interest in the shares of a licensed institution by any person where the same had been completed, or any holding of any such interest in shares which existed, at any time before the effective date and was lawful and valid immediately before such date.

By s 2 of the Act, unless the context otherwise requires, 'effective date' means the relevant date or dates, as the case may be, notified by the Minister under s 1 which in turn provides:

> This Act may be cited as the Banking and Financial Institutions Act 1989, and shall come into force on such date as the Minister may, by notification in the Gazette, appoint, and the Minister may appoint different dates for the coming into force of —
>
> (a) different provisions of this Act; or
> (b) all or different provisions of this Act in respect of different classes or categories of institutions.

By Gazette Notification N(B) No 490, dated 28 September 1989, the Minister had appointed 1 October 1989 as the date on which all the provisions of the Act shall come into force, except in respect of scheduled institutions; and he had appointed 1 January 1990 as the date on which all provisions of the Act shall come into force in respect of scheduled institutions.

By s 2, 'scheduled institution' means a person which carries on a scheduled business but does not include a co-operative society, a statutory body, a local authority, a licensed bank, a licensed finance company, or a licensed merchant bank, carrying on a scheduled business.

By s 2, 'scheduled business' means any business specified in the Third Schedule which provides:

> (1) Building credit business.
> (2) Credit token business.
> (3) Development finance business.
> (4) Factoring business.
> (5) Leasing business.

Neither defendant being a person which carried on a scheduled business, the applicable effective date, for purposes of the present case, would be 1 October 1989, and as the alleged agreement in this case had been entered into after that date, that is to say, on 14 December 1989, it was not open to the plaintiff to rely on the saving provisions of s 48(1). But, that is not all, because by providing a saving provision in respect of acquisitions or disposals or holdings before the effective date, s 48(1) necessarily implies that in respect of such transactions as are carried out on or after the effective date which offend s 45, the same would thereby be rendered illegal and invalid.

A consideration of s 54(1) and, in particular, s 54(11), points to the same conclusion.

Section 54(1)(a) authorizes Bank Negara upon being satisfied that any person has contravened, inter alia, s 45, to make a preliminary order in writing imposing any one or more of four prohibitions or restrictions in respect of shares which are the subject of the contravention. The preliminary order shall be binding, inter alia, on the defaulting person (s 54(3)). Any

person holding any shares subject to the preliminary order, shall within seven days or such longer period as Bank Negara may allow, surrender such shares to Bank Negara (s 54(4)). A defaulting person against whom a preliminary order has been made is given a right to make representation to Bank Negara, for a revocation or modification of the preliminary order (s 54(6)). In such event, Bank Negara either accedes to the representation (s 54(7)) or dismisses it by confirming the preliminary order whereupon it may dispose of the shares (s 54(8)). And, most importantly, s 54(11) provides:

> Any transaction, including any agreement or arrangement in relation to any shares, or interest in shares, or security, which is in contravention of any preliminary order, or of any order confirmed under subsection (7), or of any instructions or directions given by the Bank under subsection (10), shall be void and of no effect.

In these circumstances, we were amply satisfied that ss 48(1), 54(1) and (11), are invalidating provisions in the Act, which can fairly be considered as falling within the meaning and ambit of the exception clause in s 125(1) which provides: 'Except as otherwise provided in this Act, or in pursuance of any provision of this Act ...'.

We were therefore driven to the inevitable conclusion that the alleged agreement of 14 December 1989 had contravened s 45(1) of the Act, and being an act or undertaking which was forbidden by law in that it violated a prohibitory enactment of the legislature, it was, by reason of s 24 of the Contracts Act 1950, void.

The judge was therefore right in answering the preliminary questions of law in the way she did.

In the result, we dismissed the appeal with costs here and below. But the suit being still pending, we proceeded, in consequence, to dismiss it. Lastly, we ordered that the deposit paid into court by way of security for the costs of the appeal should be paid to the defendants to account of their taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim